FIRST AMENDMENT DEFENSES IN JUVENILE COURT

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1

First Amendment as a Sword and Shield

- First Amendment 101 – What are the basics of First Amendment analysis?
- "Unprotected" categories of speech – what are they and are they really unprotected?
  - *True threats – what is a threat?*
  - *Obscenity – what is obscene?*
  - *Fighting words – are there really "fighting words?"*
- Facial challenges vs. as-applied challenges – what defense applies to what situation?
- Examples:
  - *Ex Parte Lo – facial challenge.*
  - *State v. Tracy – as-applied challenge*
- Hypos – what's the attack?

2

What we're here to talk about…

Constitution of The United States of America, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3

First Amendment 101 in Five Minutes

- Any law that restricts speech based on its content is presumptively unconstitutional and invalid – the reverse of the usual presumption that laws are constitutional. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).
- A restriction is content-based if you have to look at the content of the speech to determine whether the restriction applies. *Ward v. Rock Against Racism*, 41 U.S. 781 (1989).

4

First Amendment 101 in Five Minutes

- Because content-based restrictions on speech are presumptively invalid, it is the government, not the defendant, that bears the burden of proving that the restriction *is* constitutional. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).
- A content-based restriction on speech is subject to strict-scrutiny review – the restriction is upheld only if it is narrowly-tailored to serve a compelling government interest. *United States v. Alvarez*, 567 U.S. 709 (2012). But content-based restrictions have *never* been upheld except in a few very limited categories.

5

What are the "speech-related" offenses? What speech do you actually see criminalized?

- Sexting
- School threats
- Bullying
- Stalking
- Disturbing the peace
- "Hate" speech
- Disorderly conduct
- Child pornography
- Dissemination of indecent material
- Crank calls
- False information to police
- "Domestic terrorism"

6

What is speech anyway?

- Flag-burning (*Texas v. Johnson*, 491 U.S. 397 (1989))
- Silence (*West Virginia Board of Education v. Barnette*, 391 U.S. 624 (1943))
- Profanity (*Cohen v. California*, 403 U.S. 15 (1971))
- Money (*Buckely v. Valeo*, 424 U.S. 1 (1976))
- Advertisement (*Bates v. State Bar of AZ*, 433 U.S. 350 (1977)
- Stripping (*Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991))

7

So That's Protected Speech?!

- Videos of "women slowly crushing animals to death with their bare feet or while wearing high heeled shoes, sometimes while talking to the animals in a kind of dominatrix patter over the cries and squeals of the animals, obviously in great pain." *United States v. Stevens*, 559 U.S. 460 (2010).
- False claim to have been awarded the Congressional Medal of Honor in a "pathetic attempt to gain respect that eluded him." *United States v. Alvarez*, 567 U.S. 709 (2012)

8

So That's Protected Speech?!

- "Explicit images that appear to depict minors [engaged in sexual acts] but were produced without using any real children." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)
- Protesting the funeral of a Marine who died in the line of duty with signs including "Thank God for Dead Soldiers" and "Thank God for IEDs." *Snyder v. Phelps*, 562 U.S. 443 (2011).

9

If That's Protected, What's *Not*?

1. Narrowly defined categories
2. Only historically recognized exceptions
3. So exceptional the USSCT hasn't identified new categories of unprotected speech for decades.
4. Even this speech isn't entirely unprotected.

10

"Unprotected" Speech

- Obscenity
- Fighting words
- Child pornography
- Incitement to imminent lawless action
- True threats
- Solicitation to commit crimes

11

Trifecta of Unprotected Juvenile Speech

- True Threats:
  - *Criminal threatening*
  - *Disorderly conduct*
  - *Stalking*
  - *Domestic Terrorism*
- Obscenity:
  - *Sexting*
  - *Dissemination of indecent material*
- Fighting Words:
  - *Disorderly conduct*
  - *Hate offenses*

12

True Threats are not mere "threats"

- Virginia v. Black, 538 U.S. 343 (2003): True threats" are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."
- Intent to cause listener to fear
- Reasonable listener would fear
- Imminent bodily injury or death
- Caused by the speaker.

13

True threats and incitement exceptions are linked…requirement of *actual threat*

- *Watts v. United States*, 394 U.S. 705, 708 (1969): a statute prohibiting threats against the life of the President could be applied only against speech that constitutes a "*true* threat," and *not against mere "political hyperbole*."
- *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911, 927-28 (1982): interpreting *Watts*, 394 U.S. at 708 as establishing that "offensive" and "coercive" speech was protected by the First Amendment, and confirming that "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment") (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

14

True Threat?

"It [is] a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."

Matal v. Tam, 137 S. Ct. 1744, 1751 (2017)

15

A true threat requires face-to-face communication

- *Virginia v. Black, 538 U.S. 343 (2003)*: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.
- *Watts v. United States*, 394 U.S. 705 (1969) (per curium) reversing conviction of 18-year old's "threats" to kill the president of the United States: "They always holler at us to get an education…. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."

16

Obscenity – *Miller* and *Ginsberg*

- *Miller v.* California, 413 U.S. 15 (1973). Nothing is obscene unless:
  - *The average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest.*
  - *The work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law.*
  - *The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.*
- *Ginsberg v. New York*, 320 U.S. 629 (1968)*:* The *Miller* analysis depends on the intended audience – things that are "obscene" for children may not be "obscene" for adults.

17

Obscenity – Another extremely limited exception

- Even if *Miller* definition is met, it is lawful to possess in the privacy of your home.
- Not equivalent to pornography.
- But exception exists if it is child pornography AND uses actual children. *Ashcroft v. Free Speech Coalition*, 435 U.S. 234 (2002).

18

And *Ginsberg* doesn't go that far…

- "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–213 (1975).
- "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. Jacksonville*, 422 U.S. 205, 213 (1975).

19

Limiting *Ginsberg* – *Reno v. ACLU*, 521 U.S. 844 (1997)

- First, we noted in Ginsberg that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." Under the CDA, by contrast, neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute.
- Second, the New York statute applied only to commercial transactions whereas the CDA contains no such limitation.
- Third, the New York statute cabined its definition of material that is harmful to minors with the requirement that it be "utterly without redeeming social importance for minors." The CDA fails to provide us with any definition of the term "indecent" as used in § 223(a)(1) and, importantly, omits any requirement that the "patently offensive" material covered by § 223(d) lack serious literary, artistic, political, or scientific value.
- Fourth, the New York statute defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.

20

Fighting Words

- The very utterance inflicts injury or tends to incite an immediate breach of peace
- (But recall, vile, offensive, hateful, hurtful, and exceptionally insulting speech is protected.)
- The USSCT has not found speech falling within this category since ***1942***.

21

Fighting words

- Chaplinsky v. New Hampshire, 315 U.S. 568, 569, 572 (1942). Defendant on a sidewalk, said: "You are a God damned racketeer" and "a damned Fascist," and "the whole government of Rochester are Fascists or agents of Fascists."
- "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."
- But that reasoning is no longer sound: Value-based approach has since been rejected.

22

Incitement of imminent unlawful violence

- The question in every case is whether the words used … create a clear and present danger.
- Schenck v. United States, 249 U.S. 47, 52 (1919).

23

Incitement of imminent unlawful violence

- Brandenburg v. Ohio, 395 U.S. 444, 447 (1969):
- Called for "revengeance" [sic] against Jews and African Americans."
- Held: "[A]dvocacy of the use of force or of law violation" is protected unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

24

Similarities between fighting words and incitement exceptions….

- Gooding v. Wilson, 405 U.S. 518, 519–20, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972): statute criminalizing the unprovoked use, **in the presence of another**, of "opprobrious words or abusive language, tending to cause a breach of the peace," to be facially vague and overbroad.
- The Court explained that Chaplinsky excluded from the free-speech protection of the First Amendment only those words that "have a **direct tendency to cause acts of violence** by the person to whom, individually, the remark is addressed." Id. at 523, 92 S.Ct. 1103 (quotations omitted).

25

Fighting words linked directly to imminent incitement of violence

- *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974), striking down as facially overbroad a city ordinance making it unlawful "to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."
- *Texas v. Johnson*, 491 U.S. 397, 409 (1989): "[W]e…have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression is directed to inciting or producing ***imminent lawless action*** and is likely to incite or produce such action[.]"

26

Key takeaway #1: What informs one categorical exception applies to another

- Clarifying prior decisions identifying categories of unprotected speech "are just that - descriptive."

"They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor."

Stevens, 559 U.S. at 471.

27

Key takeaway #2: Analysis is not based on value of speech or balancing of interests

"The First Amendment is a value-free provision whose protection is not dependent on the truth, popularity, or social utility of the ideas and beliefs which are offered."

Meyer v. Grant, 486 U.S. 414, 419 (1988), aff'd in *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2738 (2011)

28

Key takeaway #3: Categories of unprotected speech should satisfy strict scrutiny

[B]ecause the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn, (i)n every case the power to regulate must be so exercised as not…unduly to infringe the protected freedom….[T]he statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

Gooding, 405 U.S. at 522.

29

Key takeaway #3: Categories of unprotected speech should satisfy strict scrutiny

"[T]he danger of censorship presented by a facially content-based statute requires that the weapon be employed only where it is necessary to serve the asserted [compelling] interest."

R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992) (striking Minnesota's disorderly conduct law, which targeted fighting words, as failing strict scrutiny).

30

Key takeaway #4: All relevant factors must be considered in determining whether speech is unprotected.

- Complete context and all relevant circumstances surrounding the speech are not just critical, they must be considered.
- Determining that Virginia's prima facie evidence provision was unconstitutional on its face as it ignored "*all* contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut."

Black, 538 U.S. at 359-360, 367

31

Key takeaway #5: If specific intent is missing from a speech crime, then the statute is facially unconstitutional.

- Narrowing construction necessarily requires intent.
- Context matters.
- Even then, specific intent may not be enough

See e.g., "intentionally causing substantial emotional distress."

32

Key takeaway #6: There are limits to how far the Court can try to save a facially invalid speech crime

"No fair reading of the phrase 'offensive conduct' [of the disorderly conduct statute] can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created." *Cohen*, 403 U.S. at 19.

Holder v. Humanitarian Law Project, 516 U.S. 1, 27 (2010) (clarifying that judicial scrutiny of the generally applicable disorderly conduct statute in Cohen was strict scrutiny).

Due process vagueness problems in addition to First Amendment overbreadth and vagueness challenges.

33

Key Takeaway #7: Speech integral to conduct is NOT a category of unprotected speech

See e.g., *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (statute prohibiting sex offenders from accessing social networking websites violated First Amendment).

34

So how do we knock out bad statutes?

- "A statute is facially invalid if it prohibits a "substantial" amount of protected speech "judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113 (2003).
- "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.". *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)
- "[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted" *Broadrick v. Oklahoma*, 413 US. 601 (1973)

35

So lets see it in action… *Ex parte Lo*, 424 S.W.3d 10 (Tex. 2013)

- Texas statute prohibits anyone over 17 from intentionally:
  - *With the intent to arouse or gratify the sexual desire of any person*
  - *Communicates in a sexually explicit manner with a minor or distributes sexually explicit material to a minor*
  - *Using email, text message, or other electronic messaging service*

36

Ex parte Lo, 424 S.W.3d 10 (Tex. 2013)

Who has the burden? The state, of course:

"when the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed. Content-based regulations (those laws that distinguish favored from disfavored speech based on the ideas expressed) are presumptively invalid, and the government bears the burden to rebut that presumption."

37

Ex parte Lo, 424 S.W.3d 10 (Tex. 2013)

What standard of review? Strict scrutiny of course:

"The Supreme Court applies the "most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."

38

Ex parte Lo, 424 S.W.3d 10 (Tex. 2013)

How do we know if it's facially invalid? If it's overbroad:

"a statute is facially invalid if it prohibits a "substantial" amount of protected speech "judged in relation to the statute's plainly legitimate sweep." The state may not justify restrictions on constitutionally *protected* speech on the basis that such restrictions are necessary to effectively suppress constitutionally *unprotected* speech such as obscenity, child pornography, or the solicitation of minors."

39

Ex parte Lo, 424 S.W.3d 10 (Tex. 2013)

But isn't most speech criminalized by the statute unprotected, what's "substantial" mean? Doesn't matter – *any* protected speech seems to be "substantial":

"the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the *possibility* that protected speech of others may be muted."

40

Ex parte Lo, 424 S.W.3d 10 (Tex. 2013)

So does the statute cover protected speech? Yup:

"Lolita, 50 Shades of Grey, Lady Chatterly's Lover, and Shakespeare's Troilus and Cressida." "[Communication of 'indecent' material includes] much of the art, literature, and entertainment of the world from the time of the Greek myths… to today's Hollywood movies and cable TV shows."

41

Ex parte Lo, 424 S.W.3d 10 (Tex. 2013)

But doesn't providing "indecent" material to minors fall into the obscenity exception? Isn't that what was held in *Ginsberg*? Nope:

"Sexual expression which is indecent but not obscene is protected by the First Amendment." "The Supreme Court upholds statutes prohibiting the dissemination of material that is defined as "obscene" for children, but it will strike down, as overbroad, statutes that prohibit the communication or dissemination of material that is merely "indecent" or "sexually explicit."

42

Edwards v. State, 294 So.3d 671 (Miss. 2020)

- **Posting Injurious messages, § 97-45-17:**
  - *A person shall not post a message for the purpose of causing injury to any person through the use of any medium of communication, including the Internet or a computer, computer program, computer system or computer network, or other electronic medium of communication without the victim's consent, for the purpose of causing injury to any person.*

43

Edwards v. State, 294 So.3d 671 (Miss. 2020)

- Self-publishing journalist (blogger/vlogger)
- After a confrontation with a local pastor at Planet Fitness, posts videos in which he:
  - *Accused the pastor of sleeping with a "little girl"*
  - *Said he has a gun and if the pastor wanted to act like a "gangster," he'd show the pastor "what real beef looks like."*
  - *Said he was coming to the pastor's church*
  - *Said that the pastor "might not see him coming"*
  - *Accused the pastor of being the "queen" of the "undercover homosexuals" of Jackson*
  - *Accused the pastor of having been fired from a previous church for sexual misconduct*

44

Edwards v. State, 294 So.3d 671 (Miss. 2020)

Under the First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.

- "[T]he statute purports to criminalize any communication, whether true or untrue, that is intended to cause "injury to any person.""
- "In the absence of a narrower definition or limiting adjective, "injury" logically would include not only pecuniary and physical injuries but also reputational and emotional injuries."
- [The statute] criminalizes a substantial amount of protected speech, including core political speech. For example, the Constitution surely protects political attack ads. Nonetheless, any person responsible for such political speech would be subject to criminal prosecution under section 97-45-17. After all, the point of an attack ad is to injure the targeted candidate—to damage his or her reputation or popularity and ultimately to prevent his or her election or re-election.

45

Edwards v. State, 294 So.3d 671 (Miss. 2020)

Under the First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.

- "the statute also criminalizes protected speech about public figures. Nothing in the statute requires the State to prove that the defendant knowingly or recklessly posted a false message."
- "[The section] would also criminalize the famous Hustler magazine advertisement parodying the Reverend Jerry Falwell. The Supreme Court held that the First Amendment protected the parody although it was "patently offensive and … intended to inflict emotional injury" on Falwell."
- The statute would also criminalize the Claiborne County boycott and related "peaceful political activity" that the Supreme Court held were entitled to constitutional protection in N.A.A.C.P. v. Claiborne Hardware Co.The Court held that the First Amendment protected the boycotters' speech even though the boycotters "directly intended … that the merchants would sustain economic injury as a result of their campaign."

46

If it isn't a facial challenge… *State v. Tracy*, 130 A.3d 196 (2015)

"An as-applied challenge, by contrast, is one where the litigant concedes that the statute may be constitutional in many of its application, but contends that it is not so under the particular circumstances of this case."

- "Defendant's daughter was one of fifteen girls on a junior high school girls' basketball team. The basketball coach did not play defendant's daughter in the first two games of the season."
- During the next few minutes, defendant was agitated and used profanity. He kept repeating, "Why can't you put her in a game for one f'ing minute?" He asked what he could do to get her in the game, called the coach "a bitch" […] Defendant said, "You are not the fucking NBA," and stood up and moved away from the car window."

47

Are these fighting words…to a coach?

"You're not the fucking NBA."

48

Nope. *State v. Tracy*, 2015 VT 111.

- Category must be understood in light of Court's evolving case law concerning the Constitution's commitment to protecting even vile, offensive, hurtful, and exceptionally insulting speech.
- Notion that *any* set of words are so provocative that they can reasonably be expected to lead an average listener to immediately respond with physical violence is highly problematic.
- use of foul language and vulgar insults is insufficient. A likelihood of arousing animosity or inflaming anger is insufficient. The likelihood that the listener will feel an impulse to respond angrily or even forcefully is insufficient.

49

State v. Tracy: Fighting words? Conduct matters.

He called her a "bitch" and laced his invective with a vulgar four-letter word. But he did not lob heinous accusations against the coach, or taunt her to fight him. In fact, he uttered some of the offending statements as he walked away—rendering them especially unlikely to incite an immediate violent response.

50

MISSISSIPPI STATUTES

51

§ 97-7-75
Mississippi Terroristic Threats Law

- Felony. Punishable not more than 10 years.
- Are juveniles charged under the law going straight to circuit court to be tried as adults or going to youth court?
- What other statutes capture similar conduct?

52

(2)(a) A person commits the offense of making a terroristic threat when the person makes a threat to commit a crime of violence or a threat to cause bodily injury to another person if the threat does in fact cause a reasonable expectation or reasonable fear of the imminent commission of an offense and if, in making the threat, the person has the intent to:

(i) Intimidate or coerce a civilian population or segment of a civilian population to cede to the person's demands;

(ii) Influence or affect, by intimidation or coercion, the policy or conduct of a unit of government, educational institution, business or segment of the civilian population to cede to the person's demands.

(b) It is not a defense to a prosecution under this section that, at the time the defendant made the terroristic threat, the defendant did not have the intent or capability to actually commit the specified offense, nor is it a defense that the threat was not made to a person who was a subject or intended victim of the threatened act.

53

Essential Elements

1. A person
2. makes a threat to commit a crime of violence or
3. makes a threat to cause bodily injury to another person
4. if the threat does in fact cause a reasonable expectation or reasonable fear of the imminent commission of an offense and…

54

Essential Elements - Intent

6. if, in making the threat, the person has the intent to:
   a. Intimidate or coerce a civilian population or segment of a civilian population to cede to the person's demands; or
   b. Influence or affect, by intimidation or coercion, the policy or conduct of a unit of government, educational institution, business or segment of the civilian population to cede to the person's demands.

55

Not a defense…

(b) It is not a defense to a prosecution under this section that, at the time the defendant made the terroristic threat, the defendant did not have the intent or capability to actually commit the specified offense, nor is it a defense that the threat was not made to a person who was a subject or intended victim of the threatened act.

56

What's the problem with this statute?

57

§ 97-35-13
Disturbance in Public Place

Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other public place whatsoever, in the State of Mississippi, and while therein or thereon shall create a disturbance, or a breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate, or any other conduct which causes a disturbance or breach of the peace or threatened breach of the peace

58

Essential Elements

- Any person who, in any public business or any public place "whatsoever" creates a disturbance or breach of the peace in any way including (but not limited to):
  - Loud and offensive talk,
  - The making of threats,
  - Attempting to intimidate,
  - Any other conduct which causes a disturbance or breach of peace or threatened breach of peace

59

What's wrong with this statute?

60

McLaurin v. City of Greenville, 187 So.2d 854 (1966)

- McLaurin argued his speech was merely a protest against segregated conditions in Greenville and the fact that it made the crowd restive and angry does not support a conviction for a breach of public peace. Convicted of expressing unpopular views.
- Citing no USSCT law, the Court held: "This Court is fully cognizant of our duty to construe our statutes in such a manner to be sure that they will not infringe upon the constitutional rights of any person. The statute as construed by the trial court is not unconstitutional."

61

Jones v. City of Meridian, 552 So. 2d 824 (1989)

"Admittedly, the Statute being challenged by Jones may have been constructed with broad language; the Statute may arguably be construed in a manner which would reach constitutionally protected speech or conduct. These admissions notwithstanding, long-standing case law unequivocally holds that this or any other statute may not be construed 'so as to infringe upon the state or federally-protected constitutional rights' of Jones or any other individual."

62

Jury instructions in Jones v. City of Meridian

- Under the constitution of the United States and the laws of the State of Mississippi, a person has the right to speak freely, and if you believe from the evidence in this case that Mr. Jones' language and conduct at the Lauderdale County Juvenile Center on November 12, 1985, for which he was arrested, were only an exercise of his constitutionally-protected right of free speech, then your verdict should be not guilty.
- Before you can return a verdict of guilty in this case, you must find that Mr. Jones was not exercising his right to speak freely.
- In other words, before you can find that Mr. Jones created a disturbance or breach of the peace, you must believe beyond a reasonable doubt from the evidence that Mr. Jones' conduct or language exceeded the bounds of argument and persuasion and was calculated to or could have led to a breach of the peace.

63

WHERE TO GO NEXT AFTER *MCLAURIN* AND *JONES*?

64

Edwards v. State, 294 So.3d 671 (2020)

- Facial overbreadth win on First Amendment grounds!
- Use the favorable standard of review applied in the decision.
- Significant holding regarding the specific intent element--it did not save the statute!
- Relevant for your as-applied challenges.

65

Mississippi Constitution Article 3, Section 13

The freedom of speech and of the press shall be held sacred; and in all prosecutions for libel the truth may be given in evidence, and the jury shall determine the law and the facts under the direction of the court; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted.

66

Mississippi Constitution
Article 3, Section 13

The freedom of speech and of the press shall be held sacred; and in all prosecutions for libel the truth may be given in evidence, and the jury shall determine the law and the facts under the direction of the court; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted.

67

Vermont Constitution
Article 13 - Freedom of speech

That the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained.

68

Mississippi constitutional analysis and research

- Digital copies of the Acts and Resolves and Journals of the legislature is through hathitrust.org: https://catalog.hathitrust.org/Record/100634652
- Where else to go?

69

THE END

70

Did you just lie to the cops?!

The truth about the First Amendment

71

Speech Crimes that necessarily proscribe language based on content

- Targeting the content of speech explicitly to assert falsity of the information.
- False statements are protected. *Alvarez*
- Content-based and presumptively unconstitutional

72

The unlawful **overbreadth** of disorderly conduct crimes

- Violent or threatening *behavior*
- Abusive *language*
- Unreasonable *noise*
- Content-based. Think: Strict Scrutiny
- Narrower construction?
- Behavior targets conduct *not* speech

73

So how is the first amendment different in juvenile court?

- Things that are obscene for children may not be obscene for adults. *Ginsberg v. State of New York*, 390 U.S. 629 (1968).
- But the definition is the same, the analysis is the same, and the scope of the doctrine is the same. *Reno v. ACLU*, 521 U.S. 844 (1997).
- And *Ginsberg* has been narrowed over and over again. It's barely law.
- Look at threat cases closely. A "true threat" requires a subjective intent to convey a threat, an actual threat that is more than just hyperbole, and objectively reasonable fear that the threat will be carried out.
- Think about everything you know about adolescent brain development: intentional exposure to risk, sensation-seeking, impulsivity – do those characteristics undercut a true-threat analysis?

74

So how is the first amendment different in juvenile court?

- Intent is *always* an element of a narrowly-drawn statute.
- As we'll hear this afternoon, kids are very different from adults when it comes to intent.
- In particular, look carefully at offenses with a "recklessness" mens rea and a speech component – like disorderly conduct.
- Child pornography is treated differently from other categories of unprotected speech because it is the product of child sexual abuse.
- But the Court made clear that it's unprotected status has nothing to do with its content – only with its production.
- So why do we have statutes that prohibit kids from sending nude photos of each other?

75

Questions to ask

- **Is it speech?**
  - Yep. A phone call intended to annoy is certainly expressive. *United States v. Stevens*, 559 U.S. 460 (2010).
- **Content-based restriction on speech?**
  - Yep. You can't tell if the communication is "indecent" without looking at its content. *Ward v. Rock Against Racism, 41 U.S. 781 (1989).*

76

More questions to ask

- **Covers a substantial amount of protected speech?**
  - Yep. It covers some restrictable speech (obscenity), but it also covers speech that is merely indecent. *Reno v. ACLU*, 521 U.S. 844 (1997).
- **Saved by the intent section?**
  - Hmm. Nope. An intent element can save a statute if it limits the scope of the statute to unprotected speech. *Virginia v. Black*, 538 U.S. 343 (2003). But "annoyance" is not a category of unprotected speech. *ApolloMedia Corp. v. Reno*, 19 F.Supp.2d 1081 (1998) (cert. denied 526 U.S. 1061 (1999)).

77